

Scoping, Consultation, and Other Requirements

This chapter provides an overview of the scoping process, consultation, and other requirements for the proposed BMKV expansion, as well as describes the progress made in meeting those requirements.

Scoping

The process of determining the scope, focus, and content of an EIR/EIS is known as scoping. The scoping process assists the lead agencies in determining the substantive issues to be addressed in an EIR/EIS. Tools used in scoping for the BMKV expansion included early consultation with governmental agencies and the public, an NOP/NOI, and a scoping meeting.

Through a series of workshops in fall 2002, the lead agencies informally conferred with representatives from the USFWS, DFG, MCFCWCD, NSD, City of Novato, County of Marin, BMK CSD, ABAG/Bay Trail, and local residents.

The NOI/NOP for this SEIR/EIS was published in the Federal Register on November 27, 2001. Agency and public comments received by the Conservancy and the Corps during the scoping process have been assembled in a scoping report, which is included as appendix G.

The Conservancy and the Corps conducted a scoping meeting on December 5, 2001, in Novato, California, near the project site. The comments received at this meeting are summarized in the scoping report.

Key issues of public concern about the proposed BMKV expansion that were identified during the scoping process include the following.

- Flood protection
- Drainage easements and agreements
- Effects on Pacheco Pond
- Public access/Bay Trail alignments
- Novato Creek sedimentation/dredging/navigation

- Levee protection and stability
- Existing wildlife habitats
- Buffers between residential and restoration area
- Compatibility of habitat and access components
- Novato Sanitary District outfall alignment
- Use/quality/handling of dredged material
- Hazardous waste

The lead agencies have also informally conferred with representatives of the aforementioned agencies during the preparation of the Draft SEIR/EIS document through a series of stakeholder meetings, site visits, and agency meetings.

Appendix G describes the public involvement and scoping process and results in greater detail.

The Draft SEIR/EIS was circulated for public comment between July 19, 2002 and September 13, 2002. A separate volume includes the comments received on the Draft SEIR/EIS and the lead agencies' written responses to those comments.

Consultation and Requirements

Federal Endangered Species Act

The USFWS and NMFS administer the federal ESA. The federal ESA maintains a list of threatened and endangered species and provides for substantial protection of the listed species through compliance with Sections 7 and 10 of the federal ESA. NMFS is responsible for the protection of marine mammals and fishes (including anadromous fishes); all other species are within USFWS jurisdiction. Through Section 7 or Section 10 of the federal ESA, USFWS and NMFS ensure that project activities do not result in jeopardy to listed species or adverse modification of critical habitat. Under Section 7 of the federal ESA, a federal agency must ensure that its actions do not jeopardize the continued existence of a listed species and must formally consult with USFWS and NMFS if the proposed action may affect a listed species under either agency's jurisdiction.

The federal lead agency must consult with USFWS and NMFS to assess the consequences of its actions and to determine whether formal consultation is warranted. Formal consultation is initiated by the project proponent upon submission of a written request for consultation and a biological assessment of the proposed action. If USFWS and NMFS conclude that the action is not likely to adversely affect a listed species, then the action may be carried out without further review under the federal ESA. If the action is likely to result in adverse impacts on a listed species, then USFWS and NMFS will prepare a biological

1 opinion describing how the action will affect the listed species. The opinion will
2 provide either a “jeopardy opinion” or an “incidental take opinion.” A *jeopardy*
3 *opinion* concludes that the proposed action would jeopardize the continued
4 existence of a federally listed species or adversely modify critical habitat of a
5 listed species. Under this finding, the biological opinion must suggest
6 “reasonable and prudent alternatives” that would avoid a jeopardy result. If the
7 proposed actions would result in the take of a listed species, then an “incidental
8 take statement” would be issued. In an *incidental take statement*, USFWS and
9 NMFS must specify the allowable amount of take that may occur as a result of
10 the action, and USFWS and NMFS must suggest mitigation measures that will
11 reduce or avoid impacts and compensate for the take.

12 The Corps is in formal consultation with USFWS and informal consultation with
13 NMFS regarding the HWRP and the BMKV expansion. USFWS representatives
14 also participated in the design charettes conducted in 2001, as part of the
15 conceptual design. On behalf of the Corps, Jones & Stokes requested a list of
16 threatened, endangered, and candidate species in the project area. USFWS and
17 NMFS responded with several lists of such species, which are included in
18 appendix D. The *Biological Resources* section of chapter 4 describes the
19 potential for listed, proposed, or other sensitive species to occur in the area
20 affected by the alternatives. The Corps is currently preparing a draft Biological
21 Assessment. The Corps also is currently consulting with USFWS and NMFS for
22 both the authorized HWRP and the proposed BMKV expansion to determine the
23 scope of required consultation, identify species of concern, and develop an
24 appropriate approach to addressing listed and proposed species as part of the
25 Section 7 consultation.

26 National Historic Preservation Act

27 Federal involvement in the BMKV project triggers the requirement to comply
28 with NHPA Section 106. Compliance with Section 106 requires the Corps to
29 inventory historic properties and evaluate the eligibility of those properties for
30 listing in the NRHP. The effects of the proposed BMKV expansion on properties
31 that may be eligible for listing or are already listed on the NRHP was addressed
32 during that process. The *Cultural Resources* section of chapter 4 describes the
33 potential effects of the restoration alternatives on cultural resources and identifies
34 measures that may be necessary in order to avoid or reduce impacts on these
35 resources. As presented in that section, the proposed project is not expected to
36 result in any significant effects on identified cultural resources, and no NRHP
37 listed eligible or potentially eligible resources would be affected. A Section 106
38 report is currently being prepared by the Corps and will be submitted to the State
39 Historic Preservation Office for review, as necessary to comply with consultation
40 requirements.

Farmland Protection Policy Act

The Farmland Protection Policy Act (FPPA) of 1981 requires federal agencies to consider project alternatives that minimize or avoid adverse impacts on prime and unique farmland. As described in the *Land Use and Public Utilities* section of chapter 4, farmland will be affected by the restoration alternatives. The No-Action Alternative is the alternative that would best preserve the existing farmland at the site. However, none of this farmland is considered prime and unique farmland or statewide important farmland. Because of the quality of the existing farmland, the overall impact due to its loss through implementation of one of the restoration alternatives is expected to be less than significant. To fulfill the requirements of the FPPA, the Corps will consult with NRCS regarding this farmland.

Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act (FWCA) requires equal consideration of wildlife resource values in federal water-resource project planning, approval, and implementation. Compliance with the equal consideration mandate requires: consultation between action agencies and wildlife agencies or measures necessary to conserve wildlife in project planning, construction, and operation; reporting by wildlife agencies on the effects of the project and its alternatives upon wildlife resources and on measures recommended to conserve wildlife resources in connection with the project and its alternatives; full consideration by the action agencies of measures recommended to conserve wildlife resources, both with regard to the proposed project and its alternatives; and implementation of justifiable conservation measures.

The Corps, as federal lead, is consulting with USFWS on the preparation of a Coordination Act Report (CAR) for the proposed BMKV expansion. One of the goals is to provide a diverse array of wetland and wildlife habitats at HAAF and BMKV that benefits a number of endangered species and other migratory and resident species, it is expected that, with implementation of any other justifiable conservation measures, the proposed BMKV expansion will be in compliance with the FWCA.

Marine Protection, Research, and Sanctuaries Act

The Marine Protections, Research, and Sanctuaries Act (MPRSA) regulates the ocean dumping of waste, provides for a research program on ocean dumping, and provides for the designation and regulation of marine sanctuaries. Specifically, the act regulates the ocean dumping of all material beyond the territorial limit (3 miles from shore) and prevents or strictly limits dumping material that “would adversely affect human health, welfare, or amenities, or the marine environment,

ecological systems, or economic potentialities” (DOE Office of Environmental Policy and Guidance 2002).

The MPRSA is applied to activities that would directly place or dump materials into the ocean. The proposed wetland restoration project does not involve any of those types of activities. The proposed wetland restoration project involves the use of an off-shore facility that would transport dredged material for placement of dredged materials on land (e.g., on the BMKV expansion site). Therefore, the MPRSA is not applicable to the proposed BMKV expansion project.

Anadromous Fish Conservation Act

The Anadromous Fish Conservation Act (AFCA) (16 U.S.C. 757a-757g; Pub. L. 89-304, as amended) authorizes NMFS (under delegated authority from the Secretary of Commerce and/or the Secretary of Interior) to enter into cooperative agreements to protect anadromous fishery resources and to conserve, develop, and enhance anadromous fisheries.

Pursuant to the agreements authorized under the AFCA, NMFS may (1) conduct investigations, engineering and biological surveys, and research; (2) carry out stream clearance activities; (3) undertake actions to facilitate the fishery resources and their free migration; (4) use fish hatcheries to accomplish the purposes of the act; (5) study and make recommendations regarding the development and management of streams and other bodies of water consistent with the intent of the act; (6) acquire lands or interest therein; (7) accept donations to be used for acquiring or managing lands or interests therein; and (8) administer such lands or interest therein in a manner consistent with the intent of the act. Following the collection of these data, NMFS makes recommendations pertaining to the elimination or reduction of polluting substances detrimental to fish and wildlife in interstate or navigable waterways (National Council for Science and Environment 2002).

The Corps has been informally consulting with NMFS regarding the BMKV expansion and its potential effect on anadromous fishes known to occur within Novato Creek and San Pablo Bay. The Corps will implement the provisions of the AFCA as required by NMFS in order to comply with the AFCA.

Magnuson Fishery Conservation and Management Act

The Magnuson Fishery Conservation and Management Act (MFCMA) (16 U.S.C. 1801-1882; Pub. L. 94-265, amended) established 8 Regional Fishery Management Councils and required these councils to prepare fishery management plans (FMPs) for those fisheries that they determine require active federal management. Part of the preparation of an FMP is to identify “essential

fish habitat” for managed species. The MFCMA requires federal agencies to consult with NMFS to determine potential federal project effects on essential fish habitat (National Council for Science and Environment 2002).

The Corps has been informally consulting with NMFS regarding the BMKV expansion and its potential effects on marine resources. The Corps will prepare an essential fish habitat assessment and submit it to NMFS for review in compliance with the MFCMA.

Executive Order 11988—Floodplain Management

Executive Order 11988, “Floodplain Management,” requires federal agencies to prepare floodplain assessments for proposed projects located in or affecting floodplains. An agency proposing to conduct an action in a floodplain must consider alternatives to avoid adverse effects and incompatible development in the floodplain. If the only practicable alternative involves siting in a floodplain, the agency must minimize potential harm to or development in the floodplain and explain why the action is proposed in the floodplain.

As described in the *Surface Water Hydrology and Tidal Hydraulics* section of chapter 4, the entire BMKV expansion site is within the 100-year floodplain due to the subsided elevations of the site and the deterioration of surrounding perimeter levees. Because the objective of the proposed BMKV expansion is to restore tidal wetlands, the area within the expansion boundaries would be flooded. Secondary impacts involving the potential for flooding surrounding parcels as a result of the proposed BMKV expansion are addressed by design features included in the restoration alternatives and are discussed in the *Surface-Water Hydrology* section of chapter 4. This SEIR/EIS concludes that, through restoration design and implementation of mitigation measures, the BMKV expansion will not increase the potential for flooding on surrounding parcels.

Executive Order 11990—Protection of Wetlands

Executive Order 11990, “Protection of Wetlands,” requires federal agencies to prepare wetland assessments for projects located in or affecting wetlands. Agencies must avoid undertaking new construction in wetlands unless no practicable alternative is available and the proposed action includes all practicable measures to minimize harm to wetlands.

One of the primary goals of the proposed BMKV expansion is to restore wetlands in the HAAF, SLC, and BMKV parcels. As described in the *Biological Resources* section of chapter 4, the expansion would result in the loss of some of the existing tidal wetlands outside the perimeter levees and all of the existing wetlands within the perimeter levees. However, this loss would be substantially offset by the creation of both tidal wetland and seasonal wetlands under all the restoration alternatives. By returning the site to tidal action and favoring the

1 ultimate formation of tidal wetlands, the end result of the proposed BMKV
2 expansion would be a net benefit to the wetland ecosystems of the expansion site,
3 Novato Creek, and San Pablo Bay.

4 **Executive Order 12898—Environmental Justice**

5 Executive Order 12898, “Federal Actions to Address Environmental Justice in
6 Minority and Low-Income Populations,” requires federal agencies to identify and
7 address disproportionately high and adverse human health or environmental
8 effects of their actions on minorities and low-income populations and
9 communities. No permanent or temporary residences are located on the BMKV
10 site. The adjacent residential area, Bel Marin Keys, is not a minority or low-
11 income community. The analysis in chapter 4 did not identify any impacts of the
12 proposed project on the neighboring residential area that could not be mitigated
13 to a less-than-significant level with implementation of the preferred alternative
14 and the proposed mitigation. Thus no disproportionately high or adverse human
15 health or environmental effects on minority or low-income populations has been
16 identified.